U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of

ANGELO TORNABENE
Claimant

v.

HOWLAND HOOK CONTAINER TERMINAL
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

DATE: December 2, 1999

CASE NO.: 1998-LHC-02372

OWCP NO.: 02-121606

Appearances: Philip J. Rooney, Esq.
Michael E. Glazer, Esq.
For Claimant

Francis M. Womack III, Esq.
For Employer

Before: ROBERT D. KAPLAN
Administrative Law Judge

DECISION AND ORDER
AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq*. (the Act), and the regulations promulgated thereunder.

Hearing was held before me on January 27, 1999 in New York, New York. Claimant and Employer submitted briefs on September 8 and 9, 1999 respectively. Director was not represented at the hearing and did not submit a brief. This determination is based on an analysis of the record, the arguments of the parties and the applicable law.

I. STIPULATIONS AND CONTENTIONS OF THE PARTIES

Claimant and Employer entered into the following stipulations (T 5-9):[1]

1. On July 30, 1997 Claimant had an accident and sustained an injury to his chest on Employer's premises on Staten Island, New York.

2. The injury arose out of and in the course of Claimant's employment with Employer.

3. Due to the injury, Claimant was temporarily totally disabled through at least September 3, 1997.

4. Employer paid Claimant compensation for temporary total disability in the amount of $801.06 a week from July 31, 1997 through September 3, 1997, for a total of $4,005.30.

5. At all times material herein, an employee-employer relationship existed between Claimant and Employer.

6. The parties are subject to the Act.

Claimant concedes that his chest injury has resolved, but contends that he continues to suffer from causally related injuries to his neck and back. In addition, subsequent to the hearing, Claimant raised the contention that he has a causally related psychological injury.[2] Claimant argues that, due to the July 30, 1997 accident, he was temporarily totally disabled from July 31, 1997 to December 4, 1997, and that he has been permanently totally disabled from December 4, 1997, and continuing. Claimant also seeks medical benefits, pursuant to § 7 of the Act.

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[1]The following abbreviations are used herein: "CX" denotes Claimant's Exhibit; "EX" denotes Employer's Exhibit; "T" denotes the transcript of the January 27, 1999 hearing.

Pursuant to my prior rulings, the parties submitted the following exhibits post-hearing: Bills from Dr. Barbara Goldman and Dr. Naum Vaisman; narrative report dated 12/10/98 by Dr. Vaisman (CX 11); transcript of 3/10/99 deposition of Dr. Richard Pearl (CX 12); report of X-ray taken 10/19/92 (EX 21); report dated 6/17/97 by Dr. David Flicker (EX 22); transcript of 8/4/99 deposition of Dr. Milton Smith (EX 23); transcript of 7/27/99 deposition of Dr. David Flicker (EX 24). These exhibits herewith are received in evidence. Further, with his brief Claimant submitted his W-2 forms for 1996 and 1997 (CX 13). There being no objection, CX 13 is herewith received in evidence.

[2]Employer has not objected to Claimant's raising the allegation of a psychological injury after the conclusion of the hearing, and has offered medical evidence of its own relating to this question.

Employer argues that Claimant has not had any causally related disability since September 3, 1997. Employer alternatively contends that, if Claimant is found to be disabled after September 3, 1997, he has a wage-earning capacity and is partially disabled rather than totally disabled. Finally, Employer contends that it is entitled to relief pursuant to § 8(f) of the Act.

II. ISSUES

The issues remaining to be resolved are:

1. Whether Claimant has injuries to his neck and back, and a psychological injury.

2. If so, whether said injuries are causally related to the July 30, 1997 accident.

3. The nature and extent of the injuries.

4. The amount of Claimant's average weekly wage.

5. Whether Employer is entitled to § 8(f) relief.

III. SUMMARY OF THE EVIDENCE

Claimant's Testimony

Claimant was born on December 9, 1939 in Sicily, Italy, where he received four years of schooling. Claimant was employed in fishing until he came to the United States in December 1961. He began working on the New York waterfront in 1962 as a hold man. Claimant was continuously employed as a hold man until he was injured on July 30, 1997. Claimant described the hold man work he performed on ships as involving lifting and carrying heavy freight, other heavy exertion, and climbing. Claimant testified that at times he also was assigned to work in warehouses. (T 13-14, 31-32, 40-48)

Claimant testified that on July 30, 1997 he was working on Employer's pier when he was struck in the chest by a 4" x 4" piece of lumber and fell to the ground. (T 48-55) Claimant was taken by ambulance to the hospital, where he remained for five or six days. (T 55-57) Claimant testified that at the time of the accident he had pain in the chest, but he did not realize until from one to three weeks later that he also was experiencing pain in the neck and back. Dr. Ciancimino then sent Claimant for an MRI of the neck and back. (T 58-63)

Claimant testified that his chest only hurts when it is pressed, but that the pain in his neck is "very bad" and it feels "like [an] electric shock" in the neck if he turns his head quickly to the right or left. Claimant testified that his back "isn't well" and "it's very bad." Claimant stated that he must use a cane to walk on steps; he cannot sit more than about five minutes without changing position, or stand for long periods. Claimant has not engaged in gainful employment since July 30, 1997. (T 66-72) On cross-examination, Claimant stated that when he saw Dr. Ciancimino he had pain in his neck, back and right side. (T 81) Claimant also testified that he did "not really" have pain in his back

prior to the July 1997 accident. He explained that on occasion he would experience back or neck pain after a particularly hard day on the job, and he went to the union medical clinic for treatment at those times. (T 82, 86-88, 91)

Medical Evidence

Claimant was examined in the hospital emergency room on July 30, 1997 and admitted for "major chest trauma - rule out myocardial contusion." No fracture or serious coronary involvement was found. (EX 2) The next medical report is that of Dr. Albert Ciancimino, whose qualifications are not of record. The physician examined Claimant at the behest of Employer on August 18, 1997, and issued a report dated October 8, 1997. (EX 9H) The physician noted that Claimant complained of pain in the neck, chest, low back, right hip, and right knee, as well as difficulty sleeping, walking, standing, sitting, and bending, and that Claimant reported having no such problems prior to the accident. On examination, Claimant had decreased range of motion of the cervical spine. There were also myospasms of the deep and superficial cervical muscles with associated pain, and "severe and constant myospasms" of the paravertebral muscles of the thoraco-lumbar spine with severe pain, and with limited range of motion. Dr. Ciancimino opined that, if Claimant's recitation of the accident is correct, the accident of July 30, 1997 is the cause of the pathology described by the physician.

On August 19, 1997 Claimant underwent a bone scan requested by Dr. Ciancimino. (EX 2) The scan was interpreted to indicate injury to the right fifth rib and sternum and degenerative changes of the cervical and lumbar spines. Claimant underwent a series of X-rays on September 30, 1997. (EX 5) These revealed disc narrowing at C5-C6 with spondylarthritis, loss of normal lordotic curvature, partly calcified anterior annulus of the C6-C7 disc, scoliosis of the dorsal spine, hypertrophic bony changes from L1 to L5, and a sixth lumbar vertebra. On October 3, 1997 Claimant had MRI studies at the request of Dr. Ciancimino. The lumbar MRI revealed straightening of the normal lumbar curvature, normal disc heights, but posterior bulging discs at L2-L3 and L5-S1, as well as disc herniations at T12-L1, L1-L2, L3-4, and L4-L5. (EX 3) The cervical MRI revealed herniations of the discs at C3-C4, C4-C5, C5-C6, C6-C7, T1-T2, with impingement on the cervical cord at all four cervical disc levels, and impingement of the thecal sac at the T1-T2 level. (EX 4)

Dr. Milton Smith, who is Board eligible in orthopedic surgery, examined Claimant at Employer's behest on September 3, 1997 and issued a report on that date. Dr. Smith noted that at that time Claimant complained of pain in the right shoulder, neck, and low back. The physician stated that Claimant was under the care of a clinic's physicians and was being treated with physical therapy, chiropractic treatments, and pain medication. Dr. Smith reported that his examination of Claimant's neck was negative, and that there were no sensory deficits, atrophy, or weakness of the arms. Dr. Smith also noted that there was full range of motion of the spine and negative straight-leg raising. Examination of the legs revealed no motor or sensory deficits, atrophy or vascular problems. The physician opined that the injury to Claimant's sternum had resolved, there was no evidence of a "causally related disability," and Claimant was able to return to his job with Employer. (EX 7)

Dr. Smith examined Claimant a second time, on February 25, 1998. In his report of the same date Dr. Smith stated that his clinical examination of Claimant – including range of motion, reflexes, motor and sensory status – was negative. Dr. Smith found no atrophy, that Claimant's gait was

normal, and there was no peripheral vascular compromise. (EX 8) Dr. Smith opined that there was no objective evidence of a causally related disability and that Claimant was able to return to his longshoreman's job. The physician examined Claimant a third time, on November 18, 1998, and issued a report bearing that date. (EX 20) Once again, Dr. Smith reported that his examination was normal. The physician again stated that Claimant was able to return to his job. Dr. Smith was deposed on August 4, 1999, at which time he reiterated his prior clinical findings and his opinions. (EX 23) Dr. Smith testified that when he examines a patient he looks for spasm. As Dr. Smith made no notation about spasm, it appears that he did not find spasm present on the three occasions he examined Claimant. In the deposition, Dr. Smith acknowledged that the October 3, 1997 MRI revealed degenerative disease of the lumbar spine and cervical spine. Nevertheless, the physician reiterated that Claimant has no physiologic impairment at all. (EX 23, pp. 25, 33, 42)

Claimant was examined by Dr. Richard Pearl, Board certified in orthopedic surgery, on October 29,1997. (CX 8) In his report of that date, Dr. Pearl stated that there was limited range of motion of the neck, pain in the lumbosacral spine area, diminished patellar reflex on the right side and straight-leg sign on the left leg of disc herniation. Dr. Pearl also referred to the MRI findings of disc herniation, which he said were consistent with his own physical clinical finding. Dr. Pearl noted that the MRIs also revealed degenerative changes of the cervical spine. The physician opined that Claimant was "severely disabled" and would be treated with analgesics and anti-inflammatory medication. In progress notes dated October 21, 1998, Dr. Pearl stated that Claimant continued to have severe lumbosacral pain and neck pain, as well as pain in the hip and knee. Dr. Pearl opined that Claimant was "completely disabled." (CX 8)

Dr. Pearl was deposed on March 30, 1999. (CX 12) The physician testified that on his examinations of Claimant he found severe spasm of the muscles of the lumbar and cervical spine. But the physician stated that he did not find "any real neurological deficiencies [such as] a loss of reflex or pinprick sensitivity." (CX 12, p. 24) Dr. Pearl stated that Claimant had degenerative changes of the cervical and lumbar spines, as well as disc herniations, which pre-dated his July 1997 accident and caused him to have "transient" or occasional neck and back pain and did not prevent him from performing his longshoreman's job. However, the physician opined that the traumatic injury at that time – which he described as a "big whiplash" – exacerbated Claimant's pre-existing spinal conditions which previously had been mostly asymptomatic or "subclinical." Dr. Pearl stated that as a result of Claimant's traumatic injury in July 1997 "the weak points in his body became dysfunctional." (CX 12, p.14) The physician also testified that the delay in Claimant's awareness of his neck and back pain until some time after the accident was usual. (CX 12, pp. 27-28) Dr. Pearl stated the opinion that, due to the accident, Claimant is permanently unable to return to his longshoreman's job. However the physician stated that Claimant would be physically able to perform office work while sitting. (CX 12, p. 19-20) The physician also opined that Claimant should have "in-hospital workmens' compensation physical therapy and psychological counseling ... or go [to] the opposite extreme and [have] home physical therapy." But Dr. Pearl opined that traditional out-patient physical therapy was a waste of time for Claimant. (CX 12, p. 25)

Dr. Pearl stated that he referred Claimant for treatment to Dr. Paul Brisson, an orthopedist who specializes in cervical and lumbar spine conditions. (CX 12, p. 17) The record contains office

notes of Dr. Brisson. (CX 9) In a report dated October 21, 1998, Dr. Brisson stated that Claimant had not improved and was not able to sustain a normal activity level let alone return to his longshoreman job. The physician opined that Claimant had reached "the point of no return" and is permanently totally disabled due to the July 1997 accident. (CX 1)

Dr. Robert Zaretsky, who is Board certified in orthopedic surgery, examined Claimant on behalf of the Department of Labor and issued a report dated May 26, 1998. (CX 3) Dr. Zaretsky reviewed the MRI reports of October 3, 1997. He also referred to X-rays revealing degenerative changes of the lumbar and cervical spines. The physician noted that Claimant complained of pain in the neck and lumbar areas. Dr. Zaretsky performed range of motion examination, and noted a positive straight-leg on the right but negative on the left, normal reflexes, and no atrophy. Dr. Zaretsky also noted the presence of spasm at the trapezei and lumbo sacral spine. In conclusion, Dr. Zaretsky opined that Claimant appeared to be disabled and unable to perform gainful employment. The physician recommended additional physical therapy.

Dr. Naum Valsman, a psychiatrist, issued a report dated December 10, 1998 in which he opined that Claimant suffers from a number of psychological conditions that are causally related to the accident of July 30, 1997. Dr. Valsman opined that these conditions "have interfered with [Claimant's] occupational and social functioning." (CX 11) Dr. David Flicker, who is Board certified in psychiatry, examined Claimant at the behest of Employer and issued a report dated June 17, 1999. (Ex 22) Dr. Flicker opined that Claimant has a "neuro-psychiatric disability of 2 - 3% of the partial total (sic)" but that he was able to return to work. Dr. Flicker reiterated this opinion in his deposition on July 27, 1999. (EX 24)

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Claimant has Injuries to his Neck and Lumbar Spine

There is no question but that prior to the July 30, 1997 accident Claimant had severe neck and lumbar spine problems. The MRI performed on October 3, 1997 reveals that at that time Claimant had herniations of four cervical discs, three lumbar discs and two thoracic discs, as well as impingement of the spinal cord by the four herniated cervical discs. The MRI also revealed additional serious spinal conditions. It appears that none of the physicians who examined Claimant were of the opinion that these conditions were caused by the accident. Dr. Pearl addressed this question most directly, stating that the cervical and lumbar spine conditions that were revealed by the MRI pre-dated the accident and were degenerative in origin. Dr. Pearl noted that, prior to the accident, on occasion Claimant had spinal discomfort for which he sought palliative treatment. On the other hand, Dr. Pearl stated the opinion that the July 1997 accident seriously exacerbated the pre-existing defects in the cervical and lumbar spines, and rendered Claimant permanently disabled and unable to perform his longshoreman job. Where an employee's employment aggravates a non-work related, underlying disease or condition so as to produce incapacitating symptoms, the resulting disability is compensable. Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979); aff'd sub nom. Gardner v. Director, OWCP, 640 F.2D 1385 (1st Cir 1981).

In concluding that Claimant is disabled due to aggravation of his spinal conditions, Dr. Pearl relied on Claimant's complaints of pain and his clinical findings, including the presence of spasm of the muscles of the cervical and lumbar spine areas. Dr. Pearl's finding of spasm, an objective sign of injury, is the primary point of comparison with Dr. Smith's contrary opinion that Claimant has no injury. Dr. Smith failed to find that Claimant had any spasm (further, his examination was entirely negative). All three of the other physicians who examined Claimant after the accident, Drs. Pearl, Ciancimino, and Zaretsky (the impartial expert appointed by the District Director), found that there was spasm in Claimant's paravertebral muscles. Both Dr. Pearl and Dr. Zaretsky opined that Claimant's spinal condition precluded him from returning to his longshore job. The opinion of Dr. Ciancimino, contained in his August 18, 1997 report, is of less significance because it was stated at a time when Employer concedes that Claimant remained temporarily totally disabled.

Based on the foregoing, I find that Dr. Smith's opinion that the evidence fails to establish that Claimant has a disabling spinal injury is outweighed by the contrary opinions of Drs. Pearl and Zaretsky. Moreover, the qualifications of Drs. Pearl and Zaretsky, who are Board certified in orthopedic surgery, are superior to those of Dr. Smith, who is Board eligible in that medical specialty. I find that Claimant has established that he has injuries to his neck and lumbar spine.[3]

2. Claimant's Injury is Causally Related to the Accident

We turn next to the question of whether Claimant has established that his disabling spinal condition was caused by the accident of July 30, 1997. Section 20(a) of the Act aids claimants in establishing a causal relationship between injury and employment, stating that "in the absence of substantial evidence to the contrary," it is presumed "[t]hat the claim comes within the provisions of the Act." The Supreme Court in Director, OWCP v. Greenwich Collieries (Maher Terminals, Inc.), 512 U.S. 267, 280 (1994), recognized the continuing viability of the § 20(a) presumption.

Claimant has the burden of establishing the § 20(a) presumption (i.e., the *prima facie* case). To invoke the presumption, a claimant must show that (1) the worker sustained physical harm, i.e., an injury, and (2) a work-related accident occurred, or working conditions existed, which could have caused the harm. Once these two elements have been established a claimant has established a *prima facie* case and is entitled to the presumption that the injury arose out of employment. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981). Once the § 20(a) presumption has been invoked by the evidence, the employer has the burden of establishing the lack of a causal nexus. Dower v. General Dynamics Corp., 14 BRBS 324 (1981). The employer must present evidence that is sufficiently specific and comprehensive to sever the potential connection between the particular injury or disease and the job. Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 1082 (D.C. Cir.1976) Once the § 20(a) presumption is rebutted, it falls out of the case and all the evidence must be weighed to resolve the

[3]Based on this determination and my subsequent findings regarding entitlement to compensation based on Claimant's spinal conditions, the question of whether Claimant also has a disabling psychological condition is moot.

causation issue. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Hislop v. Marine Terminals Corp., 14 BRBS 927 (1982).

In the instant case, I have found that Claimant sustained injuries to his cervical and lumbar spine. This satisfies the first element of § 20(a). Further, I found that the on-the-job accident on July 30, 1997 aggravated his pre-existing spinal condition. This finding satisfies the second element of § 20(a). Consequently, the § 20(a) presumption has been invoked. Employer's sole rebuttal of the presumption lies in Dr. Smith's opinion that Claimant has no injury. However, Dr. Smith's opinion does not address the question at issue here: whether the injury is causally related to the on-the-job accident. Moreover, I previously rejected Dr. Smith's opinion. Consequently, I find Claimant has established that a causal relationship exists between his spinal conditions and his employment with Employer.

3. Claimant is Permanently Totally Disabled

I have credited the opinions of Drs. Pearl, Zaretsky and Ciancimino that Claimant is disabled due to his neck and back injuries. The first question to be determined at this juncture is whether Claimant's disability is temporary or permanent. Temporary disability converts to permanent disability at the time the injured employee reaches maximum medical improvement (MMI). MMI is a medical question. Trask v. Lockheed Shipbuilding & Constr. Co., 17 BRBS 56, 60 (1985); Mason v. Bender Welding & Machine Co., 16 BRBS 307, 309 (1984)

Claimant contends that he attained MMI on December 4, 1997, based on Dr. Brisson's examination on that date. (Claimant's Brief, p, 23) I find no report of an examination of Claimant by Dr. Brisson on that date, but note that the record contains an office note of Dr. Brisson's dated December 8, 1997. This note states that Claimant had neck and low back pain on that examination. (CX 2) Employer's brief fails to present any argument with regard to when Claimant attained MMI and his temporary total disability ceased, although at the hearing Employer stated that Claimant was temporarily totally disabled until September 3, 1999, the date of Dr. Smith's first examination. (T 9)

Claimant makes no argument in support of the contention that MMI was attained on December 4, 1997 (or December 8, 1997). Further, since I have rejected Dr. Smith's opinion that Claimant had no injury on September 3, 1997, there is no basis for finding that Claimant reached MMI on that date. Claimant initially argued that MMI was reached on May 26, 1998, the date of Dr. Zaretsky's examination. (T 10-11) However, on that date Dr. Zaretsky opined that Claimant should continue with additional physical therapy and be reevaluated in two months. (CX 3) Where additional treatment to improve an employee's condition is warranted, MMI has not yet been attained. Trask, supra; Mason, supra. Consequently, I find that Dr. Zaretsky's opinion does not support a finding that Claimant had reached MMI at the time of his examination.

The record contains no physician's statement clearly assigning a date of MMI until the October 21, 1998 report of Dr. Brisson. (CX 1) In that report Dr. Brisson stated:

> My impression to this day is that [Claimant] has indeed now attained the point of no return and shows a permanent total disability related to his work related trauma.

Based on the foregoing, I find that Claimant attained MMI on October 21, 1998, and became permanently disabled at that time.

The next matter to be resolved is the extent of Claimant's disability, i.e., whether Claimant is totally disabled or partially disabled. Disability under the Act means incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment. Entitlement to a disability award requires that the employee have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Services of America, 25 BRBS 100, 110 (1995).

This brings us to the question of whether Claimant is able to perform the duties of his longshore job with Employer, that of a hold man. Claimant testified without contradiction that this job requires lifting and carrying heavy cargo, and climbing. Employer relies on the opinion of Dr. Smith that Claimant is not disabled and is able to return to his longshore job. However, I have found that Dr. Smith's opinion that Claimant had no disabling injury after September 3, 1997 is outweighed by the contrary opinions of Drs. Pearl and Zaretsky. (See pp. 6-7, above.) Further, as noted above, on October 21, 1998, Dr. Brisson, who had been treating Claimant, stated that Claimant was unable to perform his longshoreman job. (CX 1) On the same date, which is the date I have found that MMI was attained, Dr. PearI reiterated his opinion that Claimant is "completely disabled." (CX 8) I therefore find that, due to the injuries to Claimant's neck and lumbar spine, Claimant is unable to perform the duties of his job as a hold man. Thus, Claimant has established, *prima facie*, that he is totally disabled. Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988).

Once a claimant has established a *prima facie* case, the burden of proof shifts to the employer to show the existence of suitable alternative employment (SAE). Clophus v. Amoco Products Co., 21 BRBS 261, 265 (1988); Nguyen v. Ebbtide Fabricators, 19 BRBS 142 (1986). SAE is defined as realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restriction, and which he could secure if he diligently tried. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1034 (5th Cir. 1977); American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59, 62 n.7 and related text (3d Cir. 1979). If the employer meets its burden and shows the existence of SAE, the burden shifts back to the claimant to prove that he engaged in a diligent, but unsuccessful, effort to obtain the jobs identified by the employer. Palombo v. Director, OWCP, 937 F.2d 70 (2d Cir. 1991). If the employee fails to prove this, his disability, at the most, is partial rather than total. § 8(c).

Employer contends that SAE has been established by the November 9, 1998 "Labor Market Report" of Sharon Levine, president of SMM Rehabilitation Consultants, Inc. This report describes jobs at a number of employers, which Levine states are "predominantly sedentary to light in [exertional] nature." (EX 19) In determining that these jobs constitute SAE, Levine stated that she

relied on the opinion of Dr. Smith that Claimant can return to the heavy work of his longshoreman's job.

The first problem in the Labor Market Report is that it fails to describe how the information pertaining to the following jobs was obtained: toll taker at The Port Authority of New York and New Jersey; film developer at Moto Photo, Inc., 1 Hour Photo Film Lab, Snap Shot Express; dispatcher at Diva; loading, unloading and cleaning aircraft at Triangle Aviation; stock clerk at R&S Strauss, Sears, Sam Goody stores. The report merely states:

> These jobs have been obtained via labor market surveys consisting of on site job analyses as well as via the internet access of the Daily News On-Line and the Newark Star Ledger On-Line.

It appears that Levine obtained the information regarding these jobs from classified advertisements accessed from the two newspapers' internet web sites.[4] However, Employer may not establish SAE by classified ads. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). I therefore find that Employer has failed to establish SAE with these jobs.

It appears that Levine actually contacted the employers to obtain the information regarding the following jobs:

- assembler of small automotive parts, packer, inspector at Standard Motor Products
- converter recovery at CCS cable Television Co.
- sales representative at New Concepts Communication
- automobile painter at MAACO, D&C Honda
- airplane cleaner and ramp employee at Hudson General

However, the report does not state the wages paid for the jobs at Standard Motor Products, as is required. Moore v. Newport News Shipbuilding & Dry Dock Co., 7 BRBS 1024 (1978). There is no evidence that the jobs at CCS Cable, Hudson General and New Concepts Communication were available at the time the report issued on November 9, 1999. The Labor Market Report, dated November 9, 1998, states that the CCS Cable job was available in April 1998, the New Concepts Communication job was available in April and June 1998, and that Levine visited Hudson General one month before the report issued, on October 6, 1998. Claimant is entitled to an opportunity to obtain the identified jobs. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988); Ion v. Duluth, Missabe and Iron Range Railway Co., 31 BRBS 75 (1997). Since Employer has failed to establish that these jobs existed at the time it notified Claimant of them, I find that these jobs do not constitute SAE.

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[4]Although the report contains a "Job Analysis" form describing one of these positions in detail – the job at 1 Hour Photo Film Lab – nowhere does the report reveal how that information was obtained.

The remaining jobs are that of automobile painter at MAACO and D & C Honda. A "Job Analysis" describes the work as mixing paint and painting cars using a 2-pound nozzle attached to a 5/8-inch hose. The maximum lifting is stated to be 10 pounds. Presumably, this involves lifting the cans of pain to be mixed. The report states that the jobs require full range of motion of the arms, continuously standing, and frequent walking and reaching. As noted, the only physician on whom Levine relied was Dr. Smith, who opined that Claimant had no physical restrictions or limitations. However, at the conclusion of Dr. Smith's deposition he acknowledged that Drs. Pearl and Dr. Zaretsky both found spasm present in their clinical examinations of Claimant. Dr. Smith further testified that he would restrict an individual who had such spasm from working. (EX 23, pp. 44-49) Of course, Drs. Zaretsky and Brisson opined that Claimant was unable to engage in any gainful employment, while Dr. Pearl stated that Claimant was limited to work that involved no more physical activity than sitting. Based on the foregoing, I find that Claimant's neck and lumbar area spasm and pain preclude him from performing the job of automobile painter. Further, Levine checked out these jobs on October 6, 1998, and they are not included in the Labor Market Report issued on November 9, 1998. Thus, the question of whether the jobs were available at the time Claimant received notification of them has not been established.

Based on the foregoing, I find that Employer has failed to establish the existence of SAE.[5] Consequently, Claimant is totally disabled rather than partially disabled.

4. Average Weekly Wage

Claimant contends that his average weekly wage is $1,212.41. (Claimant's Brief, pp. 20-22) Employer argues that Claimant's average weekly wage is $1,055.64. (Employer's Brief, pp. 24-25)

Claimant testified that, commencing in 1983, he began to be compensated under the industry/union guaranteed annual income program (GAI). Claimant explained that under the GAI he was paid for 40 hours of work a week, plus "container royalty" pay as well as pay for holidays and vacations. To maintain his GAI eligibility, Claimant was required to telephone on a daily to see if he would be required to work the next day and, if so, where he should report to work. In addition, he

[5]Levine's opinions regarding SAE are seriously defective for an additional reason: she failed to take into consideration Claimant's limited education and his limited ability to speak and read English. Based on my observation of Claimant at the hearing, I find that he has a fair understanding of the spoken English language, but that his use of English is somewhat limited. Further, as noted at the hearing, Claimant speaks English with an accent and he is somewhat difficult to understand. (T 85) Claimant, himself testified that he can speak and read Italian, but that he is able to understand only 20 to 40 percent of written English. (T 14) This alone significantly restricts the types of jobs Claimant is able to perform.

would lose GAI eligibility if he were not available to work in any year on more than three days when he was asked to work.

Claimant testified that for the year 1996 he was paid a total of $49,012.75, all of which was under the GAI. However, Claimant's 1996 W-2 forms show that he had longshore earnings of $49,016.75, which includes $29,552.50 from GAI, $8,600 from container royalty, and $7,776 from the vacation and holiday fund, plus earnings from several stevedore companies. (T 17-22; CX 10, 13) Claimant ceased working the day after the July 30, 1997 accident. Claimant's longshore earnings in 1997 total $45,536.00.[6] (CX 10) This amount includes container royalty and vacation payments earned in 1996.

Claimant argues that AWW should be calculated by totaling Claimant's 1996 and 1997 earnings and dividing by the 82 weeks from January 1, 1996 to July 31, 1997. Claimant calculates the AWW as $1,212.41. Using this method I calculate the AWW as $1,153.08 ($49,016.75 + $45,536.00/82). Employer argues that Claimant worked 31 weeks in 1997 (actually, he worked 30½ weeks in 1997) and earned $39,771.00 in that year, but that the GAI of $5,765 Claimant was paid in 1997 should be excluded because it was earned prior to 1997. On the other hand, Employer would give Claimant credit for container royalty and vacation pay he earned in 31 weeks in 1997. Employer calculates the 1997 container royalty credit as $8,800 ÷ 52 weeks X 31 weeks = $5,246.13. Employer calculates the 1997 vacation pay credit as $5,155.61 ÷ 52 weeks X 31 weeks = $5,155.61. Using these figures, Employer calculates the AWW as $1,055.64. (Employer's Brief, p. 24)

The basic disagreement between Claimant and Employer appears to be that Claimant contends that the GAI he was paid in 1996 and 1997 should be used to calculate his average weekly wage as of July 31, 1997, while Employer argues that pre-1997 income should be disregarded, 1997 GAI should not be counted because it was earned prior to that year, and Claimant is not entitled to credit for GAI earned in 1997 because he

> was not available for work during the remainder of the year [1997] and ... was not eligible for the GAI during that period.

(Employer's Brief, pp. 24-25)

I find that the most accurate and equitable AWW in the circumstances of the instant case is obtained by determining what Claimant would have earned during the entire year 1997 had he not been disabled due to the accident. § 10. The starting point for this determination is Claimant's longshore income over the 30½ weeks he worked in 1997. Contrary to Employer's contention, GAI payments should be included in calculating AWW. Blakney v. Delaware Operating Co., 15 BRBS

[6]Claimant states that in 1997 he earned $50,436.00. (Claimant's Brief, p. 22) However, of that sum, $4,900.00 was earned by Claimant's wife at "Christie Helen." (CX 10)

273 (1992). In addition, I find that Employer's argument that Claimant is not entitled to GAI earned in 1997 because he was not "eligible" for it, is both without merit and irrelevant. It is without merit because the sole reason that Claimant did not earn GAI in 1997 was that he was not available for work for over 20 weeks in 1997 due to his work-related disability. Employer's argument is irrelevant to the extent that GAI earned in 1997 (as opposed to GAI that was paid in 1997) will not be considered by me in calculating Claimant's AWW. (Indeed, neither party has given me a figure for what Claimant could have earned in GAI in 1997, and I know of no way to determine that amount.) Further, holiday pay and vacation that Claimant was paid in 1997 should also be counted. Sproull v. Stevedoring Services of America, 28 BRBS 271 (1994). Finally, I find it reasonable to assume that the direct wages from longshore employers that Claimant received for the 30½ weeks he worked in 1997 until he was injured, would have been paid to him, on a pro rata basis, over the remaining portion of 1997.

The record shows that in 1997 Claimant received the following longshore income (CX 10):

•	Container royalty	–	$8,800
•	Vacation and holiday pay	–	8,648
•	GAI	–	5,765
•	Int'l Term. Op. Co. (ITO)	–	621
•	Maher Terminal	–	2,024
•	Howland Hook Container	–	17,492
•	American Stevedoring	–	219
•	Stevedoring Systems	–	276
•	Sealand System	–	1,691
	TOTAL		$45,536

Based on the foregoing, the projected amount that Claimant would have earned in 1997 includes the total of $45,536 which he was actually paid that year (this includes 1997 container royalty, holiday and vacation pay, and GAI – all of which was earned in 1996). Of this sum, Claimant earned a total of $22,323 by working for the employers identified above. I shall assume that, but for Claimant's July 30, 1997 accident, he would have continued to earn the same weekly wages from longshore employers in the remainder of 1997 that he earned that year until July 31, 1997. These projected additional 1997 earnings total $15,735.88 ($22,323 ÷ 30.5 weeks X 21.5 weeks). Thus, Claimant's calculated total earnings for 1997 are $45,536 plus $15,735.88, for a total of $61,271.88. I therefore find that Claimant's average weekly wage is $1,178.30 ($61,271.88 ÷ 52 weeks).

5. Employer is Not Entitled to § 8(f) Relief

Section 8(f) shifts an employer's liability for permanent disability and death benefits from the employer to the Special Fund established by § 44 when the disability or death is not due solely to the injury which is the subject of the claim. The essential elements of § 8(f) are met, and an employer's liability is limited to 104 weeks of compensation, if the record establishes that: (1) the employee had a pre-existing permanent partial disability, (2) it was manifest to the employer, and (3) it combined with the subsequent injury to produce a greater degree of permanent disability. C&P Telephone v.

Director, OWCP (Glover), 564 F.2d 503 (D.C. Cir. 1977), overruled by Director, OWCP v. Cargill, 709 F.2d 616 (9th Cir. 1983); Equitable Equipment Co., v. Hardy, 558 F.2d 1192 (5th Cir. 1977); Reed v. Lockheed Shipbuilding & Construction Co., 8 BRBS 399 (1978); Nobles v. Children's Hospital, 8 BRBS 13 (1978).

Prior to the hearing, Employer submitted an application for § 8(f) relief to the District Director. (EX 9) On November 21, 1997 the District Director denied the application. (EX 10) As noted above, Director was not represented at the hearing before me and did not file any argument with me.

The first of the three elements necessary to establish entitlement to § 8(f) relief – that the employee had a pre-existing permanent partial disability – has been interpreted to mean that the employee had a prior serious impairment that would motivate a cautious employer to discharge or refuse to hire him or her. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995), affirming 8 F.3d 175 (4th Cir. 1993); C&P Telephone Co., supra. The Supreme Court in Newport News Shipbuilding & Dry Dock Co., supra, held that under § 8(f) the term "disability" need not include an economic component.

Claimant testified that prior to his July 1997 accident he had visited and was treated at the International Longshoreman's Association medical clinic due to occasional pain in the neck and low back, caused by the work he was doing. (T 86-88) An X-ray of Claimant's lumbosacral spine taken on October 19, 1992 revealed early degenerative changes, consisting of early osteophyte formation throughout. (EX 21) Further, as noted, the MRIs performed on October 3, 1997, two months after Claimant's accident, revealed multiple cervical and lumbo sacral disc herniations, and impingements of the cervical spinal cord. These changes were found to be degenerative in nature (i.e., that they pre-dated the 1997 accident) by Drs. Smith, Pearl, and Zaretsky, as noted above.

Based onthe foregoing, I find that Claimant had pre-existing serious and long-lasting degenerative lumbosacral spine and cervical spine conditions. These conditions were manifest in the 1992 X-rays. Consequently, Employer had constructive knowledge of them. Director, OWCP v. Universal Terminal & Stevedoring (De Nichilo), 575 F.2d 452, 457 (3d Cir. 1978).

In addition, § 8(f) is not applicable where the "second" injury would have rendered the employee permanently totally disabled regardless of any pre-existing permanent partial disability. Price v. Greyhound Bus Lines, Inc., 14 BRBS 439 (1981). In the instant case, Employer has the burden of establishing that the July 30, 1997 injuries would not have rendered Claimant permanently totally disabled absent the pre-existing spinal conditions. Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748, 750 (5th Cir. 1990); Director OWCP v. Luccitelli, 964 F.2d 1303, 1305-06 (2d Cir. 1992).

I find that Employer has failed to carry its burden to establish the requisite element that Claimant's permanent total disability was not due solely to the July 1997 injuries. Employer argues that Dr. Pearl testified that the July 30, 1997 accident alone would not have rendered the Claimant as seriously disabled in the absence of the prior degenerative disc disease. I disagree with Employer's

interpretation of Dr. Pearl's statements. Further, even if Dr. Pearl did state the opinion ascribed to him by Employer, this is not relevant to the question of whether the "second" injury alone caused Claimant's permanent total disability.

Employer also relies on the opinion of Dr. Smith that the July 30, 1997 accident alone would not have been sufficient to render Claimant disabled. (Employer's Brief, p. 35) After Claimant's medical history was described to the physician, Dr. Smith was asked by Employer's counsel:

> Doctor, do you have an opinion as to whether the accident of July 30, 1997 alone would have been enough to render him disabled, assuming that he had been disabled following the accident?

The physician answered: "No, it would not have been." (EX 23, p.25) However, Dr. Smith failed to provide any basis for this opinion. I find that Dr. Smith's naked negative is insufficient to establish that the July 1997 injuries alone did not cause Claimant's permanent total disability.

The evidence that best supports Employer's contention is Dr. Pearl's testimony that Claimant's herniated discs pre-dated the July 1997 accident and that, while his neck and back conditions were largely asymptomatic prior to the accident –

> After the injury it became devastating to him and those weak points in his body became dysfunctional.

(CX 12, p. 14) However, Dr. Pearl did not state whether or not Claimant would have become permanently totally disabled by the July 1997 injuries alone. Furthermore, I find that Dr. Pearl's statements are insufficient for me to infer what his opinion might be with respect to this question.

Based on the foregoing, I find that Employer has failed to establish that the July 30, 1997 injuries alone did not cause Claimant to be permanently totally disabled.[7] Consequently, Employer is not entitled relief under § 8(f) of the Act.

ATTORNEY'S FEE

No award of an attorney's fee for services to the Claimant is made herein since no application for fees has been made by Claimant's counsel. Thirty (30) days is hereby allowed to counsel for the submission of an application for fees conforming to the requirements of 20 C.F.R. §702.132 and §702.133 of the regulations. A service sheet showing that service has been made to all parties, including the Claimant, must accompany the application. Parties have thirty (30) days following receipt of such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

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[7]The fact that I have previously found that the July 1997 accident exacerbated Claimant's pre-existing neck and lumbar spine problems does not serve to answer this question, but shows only that the accident caused Claimant's condition to become worse.

ORDER

The District Director shall perform all calculations necessary to effect this Order.

It is ORDERED that:

1. Employer Howland Hook Container Terminal shall pay Claimant Angelo Tornabene: weekly compensation, based on an average weekly wage of $1,178.30, for temporary total disability from July 31, 1997 through October 20, 1998, and for permanent total disability commencing on October 21, 1998 and continuing, plus appropriate interest.

2. Employer shall provide Claimant medical benefits pursuant to § 7 of the Act.

It is further ORDERED that Employer is not entitled to relief pursuant to § 8(f) of the Act.

Robert D. Kaplan
Administrative Law Judge

Dated: December 2, 1999
Camden, New Jersey